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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 8.

BALL BROTHERS COMPANY, FRANK CLAYTON BALL, GEORGE A. BALL, et al., Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

REPLY BRIEF ON REARGUMENT.

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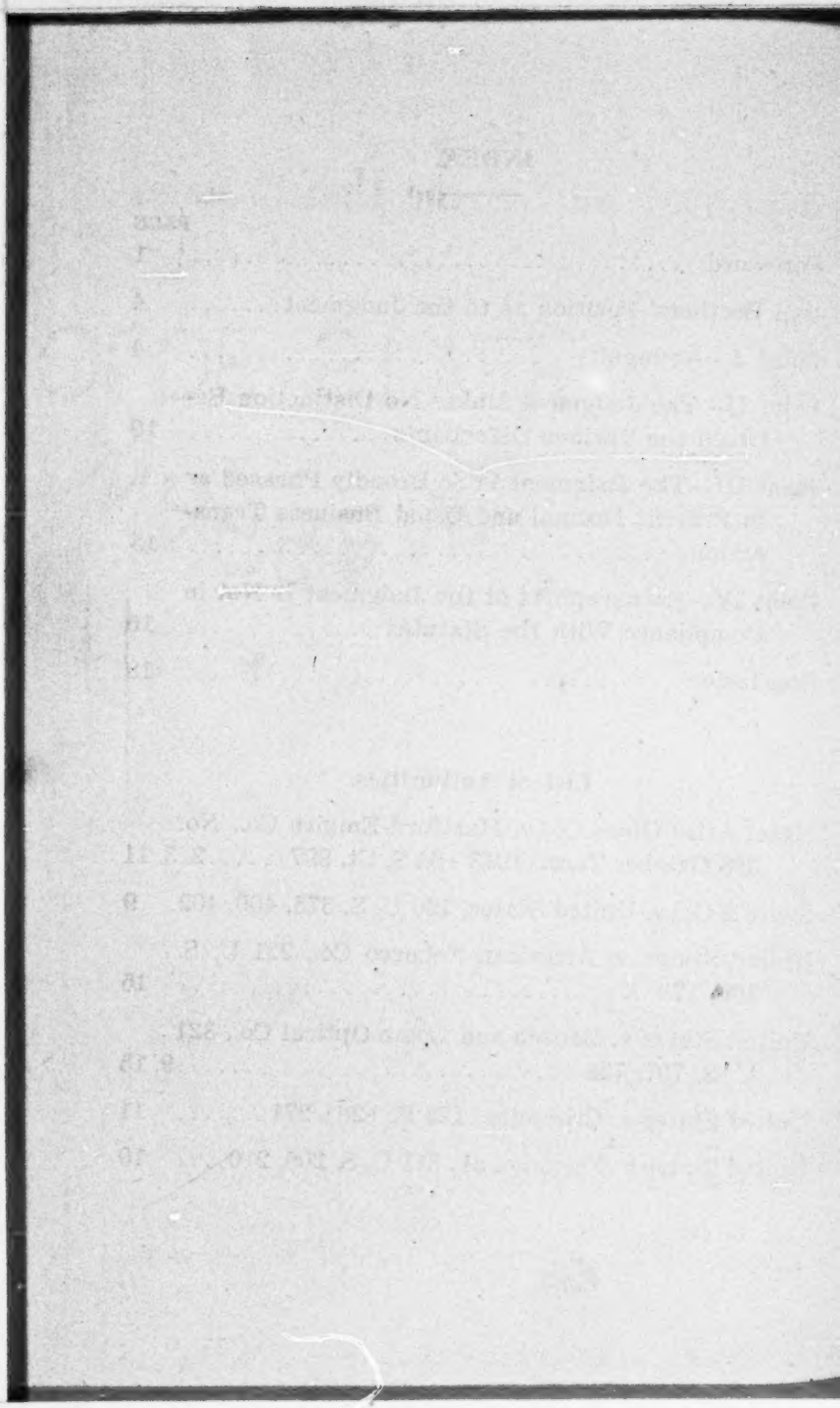
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Foreword.

In compliance with the order of this Court, dated May 15, 1944, requesting joint argument and joint briefing by appellants in connection with objections to the judgment, the appellant, Ball Brothers, and the individual defendants associated with it, joined with the other appellants in the preparation of the joint brief heretofore filed. As to this brief, it is suggested that it sets forth a composite of appellants' arguments rather than the arguments of any individual defendant, except in connection with those paragraphs of the judgment which are objected to by but one corporate defendant.

It appears that the joint brief has caused the Department to overlook the fact that its charges, as well

as the evidence adduced at the trial of this cause, differ for each corporate defendant. In our main brief, we attempted to fairly and concisely set forth the facts of the entire situation as they involved Ball Brothers and the individual defendants associated with that corporation. We, therefore, again direct attention to the Statement Of The Case as it is set forth in pages 3 to 22, inclusive, of our main brief.

We supplement that statement by noting that the Government's charges as to a conspiracy in no way involve the acts or activities of Ball Brothers prior to March 25, 1933 i.e., prior to the day it accepted a license under Hartford's feeder patents (R. 93-94 I—Item 3c—p. 133 G. Br.)* As to this, we particularly note that there is nothing in the record which either indicates or suggests that Ball Brothers, or any individual defendant associated with it, was cognizant of the matters forming the basis of this Court's holding in the case of *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, No. 398, October Term, 1943 (64 S. Ct. 997). As a matter of fact, Ball Brothers and the Ball defendants first learned of this situation, and the circumstances involved thereby, during the trial of the present cause.

In addition, the record discloses that during the TNEC hearings Ball Brothers and the Ball defendants first learned of the co-operation of Hartford, Hazel Atlas and Owens which resulted in the sharing of royalties collected by Hartford under licenses granted by it (R. 3050 IV, 4279 VI; Ex. 1228, R. 3068 IV; 13816 XXI). See also page 79 of the District Court's opinion. As a matter of fact, the negotiations which resulted in the so-called settlement agreement of August 1, 1940

*Brief for the United States on Reargument.

(Exhibit 5026 R. 9527 XIII) were instituted in an effort to settle a controversy based on the fact that the royalties paid to Hartford by both Hazel Atlas and Owens were, in fact, different from those paid by Ball Brothers, although the agreement of March 25, 1933 (Exhibit 199)—under which Ball Brothers acquired its license to use Hartford feeder inventions—contained a representation on the part of Hartford that Hartford had not, theretofore, granted any license which provided for royalty rates lower than those payable by Ball Brothers (R. 8883 XII; see also F. 513, R. 7379X). The facts developed at the TNEC hearings disclosed that rebates, made by Hartford to both Owens and Hazel Atlas had the direct and intended effect of materially reducing their royalty rates far below those defined in the Ball license agreement.

Ball Brothers and the individual defendants associated with it, likewise, had no knowledge of those facts which form the basis of the Department's charge that Owens and Hartford co-operated in an effort to fraudulently withhold from the Patent Office evidence bearing on the operativeness of the structures disclosed by the Hitchcock patents (G. Br. 108-110).

Ball Brothers, therefore, urges that, by co-operating with other defendants in the preparation of the joint brief, it did not intend to place itself in the position of condoning, or in any way excusing, those acts which formed the basis for this Court's decision in *Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra,* or those acts above referred to or such other acts as form the basis of the Department's charges based on the acquisition of patents by Hartford and Owens and the use of such patents for "blocking off" and "fencing in" purposes, as charged on pages 204-215 of the Government Brief.

Ball Brothers' Position as to the Judgment.

Ball Brothers in this reply does not intend to raise any question as to the power of the Court in defining an injunction under the Anti-Trust Statutes, except as to paragraph 44 of the judgment. It, however, desires to raise the following points, viz.:

1. That certain paragraphs of the judgment are so broadly phrased that they are ambiguous and therefore susceptible of more than one interpretation;

2. That the judgment makes no distinction between the various defendants—corporate and individual—and therefore has the effect of being unnecessarily drastic and of imposing penalties rather than remedies, as to some such defendants;

3. That the judgment is so broadly phrased as to prevent normal and usual transactions which in themselves are neither unlawful nor contribute to a conspiracy nor to the maintenance of the effect of a prior conspiracy; and

4. That paragraph 44 of the judgment is not in compliance with the statutes in that it has the direct effect of imposing a penalty on Ball Brothers.

Point I—Ambiguity.

We realize that we risk arguing points discussed by other defendants in referring to such paragraphs of the judgment as paragraphs 31, 36B, 51 and 52 in connection with our discussion of paragraph 41.

As to the last mentioned paragraph, we submit that the Department begs the issue when it dismisses our contention as resting entirely upon imagined contin-

gencies which do not come within the language of the paragraph (G. Br. 188). A reference to the last several lines of paragraph 41 will disclose that its broad wording is such as to render it so indefinite that its specific meaning can not be defined. As stated in the joint brief, every agreement concerning trade restrains, therefore, it is contended that the wording employed in paragraph 41 is such as to prevent even those normal and usual agreements which are essential to trade. For the purpose of accentuating our point, we quote that portion of paragraph 41 which bears on Ball Brothers and the individual defendants associated with it:

> "Ball Brothers Company and the individual defendants associated therewith * * * and each of them be and hereby are enjoined from continuing or entering into any agreement or undertaking by or between any of them or with any other manufacturer or distributor of glassware or of machinery used in the manufacture of glassware, the effect, purpose, or result of which is to restrain or *limit* whatsoever the production or sale of fruit jars."

In our opinion, the broad wording here quoted speaks for itself in disclosing ambiguity.

There are few agreements or undertakings relating to the manufacture or distribution of glassware or of machinery used in the manufacture of glassware which do not have the effect of at least *limiting* trade. It is true that the above quoted clause bears specifically on the effect of such agreements or undertakings on the production or sale of fruit jars, but it is nevertheless apparent that the clause is so worded that any agreement or undertaking, no matter how innocent of intent, will fall within the prohibition of the clause, if it in any way

imposes a limitation on the production or sale of fruit jars.

The examples that might be given as to conditions which can be construed as imposing some limitation on production or sale are almost limitless, but we refer again to the examples noted in the joint brief at pages 161 and 162 and submit that these clearly disclose interpretations which may be placed on the broad wording of paragraph 41. Our contention as to this paragraph, and also as to all of the other paragraphs above enumerated, is that neither Ball Brothers nor any individual defendant associated with it will ever be certain as to the propriety of his acts and as to whether or not an act —innocent in itself and having no direct or indirect bearing on the presently charged conspiracy or any future conspiracy—will subject him to the penalties of a contempt proceeding.

Comparison of the above quoted portion of paragraph 41 will disclose that it is almost identical with the last several lines of paragraph 42 of the judgment. Our objection to the wording involved of course applies to that wording in both paragraphs 41 and 42.

As to paragraph 31, we note that it either involves all types of agreements and contracts which may hereafter be entered into by and between any of the defendants in the present cause or it is ambiguous as to its intent and purpose. In its effort to answer this criticism as to this paragraph 31, the Department (G. Br. 169) suggests that a fair reading of the paragraph will disclose that it only applies to agreements "made pursuant to this judgment". This, however, involves an interpolation of the term "pursuant to this judgment" in the

early portion of the paragraph. We submit that a rewrite of this pargaraph will avoid the ambiguity and still provide the Department with the remedy it seeks.

In connection with paragraph 36B, we direct attention first to the fact that the individual defendants as well as the corporate defendants are *perpetually* enjoined from the acquisition of such property as is there defined, independently of the circumstances surrounding each such defendant at the time of such acquisition. That is to say, paragraph 36B is so broadly phrased that each defendant is limited and restricted as to his future activities so long as he is engaged in the manufacture, sale or distribution of glassware or glass-making machinery and independently of whether the official status of the individual defendant is changed from that of an official to a mere employee of some organization, firm or individual engaged in the manufacture, sale or distribution of glassware or glass-making machinery.

A consideration of this paragraph will also disclose that it is so broadly phrased that no defendant may safely purchase a second-hand machine from another glass manufacturer, unless such manufacturer is regularly engaged in the sale of such machinery. This in itself discloses the ambiguity of the paragraph.

For the sake of brevity, we consider paragraphs 51 and 52 together and note that the wording employed in each paragraph is such that the meaning of the paragraph is impossible to ascertain. As to paragraph 51, it seems clearly apparent that aside from patents issued directly to a defendant (corporate or individual) by the Patent Office, the defendant is prevented from acquiring any right greater than a non-exclusive right under a

patent. On the other hand, paragraph 52 prevents the filing or prosecution of an application for patent for the purpose "in whole or in part" *of blocking off, fencing in, preventing, or hindering the use or development or improvement by others of machines, methods, means or processes which obtain or are capable of obtaining results in the glassware-making art identical with, similar or alternative to those obtained or obtainable by machines, methods, means or processes embodying inventions covered by, owned or controlled by the defendant prosecuting said application for patent.* In other words, paragraph 52 wholly offsets the effect of the proviso clause of paragraph 51, since it has the direct effect of preventing the filing or the prosecution of an application which bears on, covers or constitutes an improvement on any machine or process used by the defendant filing or prosecuting the application. It also prevents the filing or prosecution of an application which when issued into a patent will have its ordinary effect in limiting the activities of parties other than those owning or having rights under it. If this is not the direct effect of paragraph 51 and 52 of the judgment, then we submit the paragraphs are ambiguous.

In addition to the above, we note that the portion of paragraph 52 which requires commercial use of patented inventions, ignores the possibility of a changing condition and ignores the fact that the precise species of the invention disclosed by the patent may be rendered obsolete during the period of the pendency of the patent. The patentee may, therefore, commercialize another species of the invention. From the standpoint of ambiguity, we suggest that the paragraph does not provide for such a contingency but places the

burden on the defendant patentee of construing the patent and determining whether or not the structure or procedure commercialized by him is in fact covered by the patent. That is to say, the paragraph is drafted in such broad terms that it provides a basis for penalizing the defendant patentee for misinterpreting the scope of his patent. If this is not the intent then, we submit, this portion of the paragraph is ambiguous.

As to paragraphs 51 and 52, we are attempting to show that the ambiguity therein is such as to place each defendant in the position of not being able to determine whether or not his acts may be considered by the Court as a violation of the judgment. Even so, the judgment is so drafted that it places each corporate defendant and each individual defendant in a position such that he may be held for contempt and merely because the construction he placed upon the judgment does not conform with that of the District Court.

Our reference to paragraph 31, 36B, 51 and 52 of the judgment is by way of example only, since we submit that ambiguity extends throughout the entire judgment. As to this, we refer to this Court's holding in the case of *United States v. Bausch and Lomb Optical Co.*, 321 U.S. 707, 728 in which it is noted that a portion of the judgment *"is too indefinite for judicial enforcement and therefore improper"*. We submit that this applies to many paragraphs of the judgment. We also submit that the judgment should be couched in such clear and concise terms that each defendant will be informed, as accurately as possible, what he is forbidden to do. *Swift & Co. v. United States,* 196 U.S. 375, 400, 401, 402.

Point II—The Judgment Makes No Distinction Between the Various Defendants.

In approaching this, the second, point of our discussion, we note that we are interested only in Ball Brothers and the individual defendants associated with it.

The Department's Brief on Reargument treats the situation as if there were but one conspiracy involved by the charges of the complaint. In this connection, we note that those charges extend to acts which occurred as early as 1916. As a matter of fact, the major portion of the complaint deals with transactions, agreements and undertaking which were consummated long prior to March 25, 1933, the date on which it is charged that Ball Brothers and the individual defendants associated with it, joined the conspiracy.

In our main brief, we have stressed the fact that neither Ball Brothers nor any individual defendant associated with it had knowledge of the acts, agreements or undertakings, prior to March, 1933, which the complaint stresses as the basis for the conspiracy there charged. As to this, we most strongly urge that Ball Brothers can not be held to be a conspirator in connection with matters of which it had no knowledge, and we reassert the rule enunciated by this Court in the case of *United States v. Falcon et al.* 311 U.S. 205, 210 to the effect that *those having no knowledge of a conspiracy are not conspirators.*

This brings us to the point of submitting that if Ball Brothers and the individual defendants associated with it are conspirators as to any matters involved by the complaint, they can not be held to be conspirators

as to those matters, for example, which formed the basis of this Court's opinion in *Hazel-Atlas v. Hartford, supra.* They can not be held to be conspirators in connection with any conspiracy involving the withholding of information from the Patent Office in connection with the acquisition of patent protection. They can not be held to be conspirators in connection with any conspiracy involving the acquisition of so-called competing patents from Tucker, Reeves and Beatty, Ed. Miller, Whithall-Tatum, etc. and neither Ball Brothers nor any one of the individual defendants associated with it can be held to have had any part in the rebating of Hazel Atlas and Owens by Hartford, whereby those companies were placed in a preferred position with relation to Ball Brothers and their other competitors.

For all these reasons, it is submitted that if Ball Brothers is held to be a conspirator as to any matters charged by the complaint, it can not be held to be a conspirator in connection with those transactions which were concluded and consummated prior to the termination of the year 1932.

The Department relies on the decision of Judge Learned Hand in the case of *United States v. Crimmins,* 123 F. (2d) 271, in substantiation of its contention that it is not essential that one conspirator be fully informed as to what the others are doing or even acquainted with them, if he has knowledge of the general objects of the conspiracy and helps it along (G. Br. 12). The Department however overlooked the fact that the case on which it relies stands for the following rule (123 F. (2d) 271, 273):

> "Courts do indeed say that each conspirator is chargeable with the acts of his fellows done in fur-

therance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the substantive crime. *It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding.*" (Italics ours)

In view of the above, we submit that it is not sufficient to contend that Ball Brothers profited by a conspiracy which originated in 1916, and was fully consummated by the sharing of royalties in 1924 and 1932, since there is nothing in the complaint or in the proofs brought under the complaint which either ties Ball Brothers with these early activities or discloses that it had knowledge of those activities.

The record shows that the officials of Ball Brothers first heard of some of these activities during the TNEC hearings. It also shows that the controversy which resulted in the settlement agreement of August 1, 1940 (Ex. 5026), was initiated shortly after such knowledge was acquired (Ex. 1228 R. 13816 XXI). The record also shows that the controversy not only resulted in a settlement between Hartford and Ball Brothers, but also resulted in Ball Brothers' giving up its semi-exclusive license in connection with the production of fruit jars, under Hartford's feeder patents, and the cancellation of Hartford's option to have the first refusal of Ball Brothers' feeder patents in the event Ball Brothers considered selling or licensing the same (Finding 513—

R. 7379 X). That is to say, Ball Brothers acted promptly after the TNEC hearings.

In concluding this chapter of our brief, we note that the individual defendants now associated with Ball Brothers are George A. Ball, W. H. Ball, Edmund F. Ball and Fred J. Petty. As to these defendants, we quote the following findings by the Trial Court (R. 7398 X):

"613. Both Frank C. Ball and George A. Ball negotiated, among others, the March 25, 1933 agreement between Ball Brothers and Hartford, and F. C. Ball signed that agreement as president of Ball Brothers as well as the agreement of March 23, 1933, with Knox and its president. Both Frank Ball and George A. Ball, as directors of Ball Brothers, ratified and confirmed the aforesaid contracts with Hartford and with Knox and its president, as well as the contract of April 27, 1933, between Ball Brothers and Brockway and its president.

"614. W. H. Ball and Edmund F. Ball have each been directors of Ball Brothers at least since March 25, 1933. Each ratified and confirmed the agreement of March 25, 1933, with Hartford, the contract of March 23, 1933, with Knox and its president, and the contract of April 27, 1933, with Brockway and its president. W. H. Ball also signed this last mentioned agreement as secretary of Ball Brothers.

"615. Fred J. Petty has been a director of Glass Container Association since 1936, and of Ball Brothers since September 21, 1935, both of which positions he still holds. From January 7, 1930, until sometime in 1940, he was assistant secretary of Ball Brothers and since then has been secretary.

As assistant secretary, he attested the March 25, 1933, agreement between Ball and Hartford. As secretary, he attested the August 1, 1940, amendment to this agreement which contained the Corning field exclusions."

We quote these findings for the purpose of accentuating the fact that if Ball Brothers and the individual defendants associated with it are involved in a conspiracy, it was not a conspiracy such as is alleged to have been consummated in 1932 by the division of royalties among the defendants, Hartford, Hazel Atlas and Owens.

The judgment as written, nevertheless, places Ball Brothers and the individual defendants associated with it in the same position as those defendants which the complaint alleges were active in a conspiracy which started in 1916, was fully effective in 1924, and had reached its fruition in 1932. For example, Ball Brothers and each of its individual defendants is prevented from acquiring patents bearing in any way on glassware, glass-making machinery or the production of glassware. It and such individual defendants are even prevented from acquiring an exclusive license under such patents. Each of these defendants is also directed not only to grant free licenses under his existing patents or applications for patents, but also to furnish the licensee with patterns and drawings bearings on the licensed apparatus. Each of these defendants is also required to grant licenses under such future inventions as he may make or acquire. In other words, we are contending that even if Ball Brothers and the individual defendants associated with it are held to be parties to a conspiracy, their acts and activities do not merit a judgment such as the judgment here under consideration.

Point III—The Judgment Is So Broadly Phrased as to Prevent Normal and Usual Business Transactions.

It is our contention that the interpretation placed on the Sherman Act by the courts has made it apparent that normal and usual contracts do not come within its prohibition. *United States v. American Tobacco Co.*, 221 U.S. 106, 179. With this as a basis, we contend that the present judgment is far more drastic than the circumstances require. It prevents even those normal and usual contracts and transactions which are essential to trade, and independently of whether or not they are lawful or unlawful or constitute a part of a lawful or unlawful scheme. While we recognize the rule stated by this Court in *United States v. Bausch and Lomb Co., supra,* viz.:

> "Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole"

nevertheless, it is submitted that this rule does not contemplate judgments and injunctions which are punitive rather than remedial and which prohibit the use of admittedly valid parts of a *valid* whole. We, therefore, contend that the present judgment extends far beyond what is necessary to prevent the continuation or recurrence of such conspiracy as is charged against Ball Brothers and the defendants associated with it.

In connection with the question of the scope of the judgment, we stress what appears to us to be two extremely important features of the present situation, at least as that situation involves Ball Brothers and the individual defendants associated with it. First, the agreement of March 25, 1933 (Ex. 199)—which forms

the basis of the Government's charges as to Ball Brothers—was modified more than four years ago in such a way as to strip therefrom the features thereof which formed the basis of the Government's criticism. Second, as early as October, 1940, Ball Brothers released the Knox Companies and their president, the Brockway Company and its president from all obligations under the agreements involving those companies (Findings 514 and 515; R. 7379 X). We note this for the purpose of showing a running of time sufficient to fully dissipate the effect of any conspiracy such as is charged and to which Ball Brothers and the individual defendants associated with it could have been parties.

Point IV—Paragraph 44 of the Judgment Is Not in Compliance With the Statutes.

In replying to the Department in connection with its statement as to the impounding of $425,000 in compliance with the terms of paragraph 44 of the judgment, we note first that the Department either does not understand the conditions leading up to the settlement agreement of August 1, 1940 (Ex. 5026) or that it has intentionally ignored some of the facts involved by that agreement.

Under the agreement of March 25, 1933, Ball Brothers acquired a license in the nature of an exclusive license to employ Hartford's patented feeder inventions in the production of fruit jars. In the light of this Court's holdings in *General Talking Picture Corp. v. Western Electric Co.*, 305 U.S. 124, 127 and *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 456, it seems clear that the acquisition of an exclusive license under

patents and even an exclusive license restricted to certain fields of use, has always been considered lawful. It, therefore, is apparent that the Department is misadvised in concluding that the mere acquisition or acceptance of a license, such as Ball Brothers obtained under Hartford's feeder patents, was an unlawful act.

The Department is also misadvised as to the transaction which involved the payment to Ball Brothers of the $425,000 which forms the subject matter of the impounding order here under consideration. As is clearly disclosed by the Trial Court's finding (Finding 513, R. 7379 X) the payment by Hartford to Ball Brothers not only involved the release of the exclusive feature of Ball Brothers' license, but it also involved a settlement of a controversy between Ball Brothers and Hartford. It, therefore, can not be defined as a payment for the "release of Hartford's unlawful promise not to permit new companies to enter the fruit jar field" (G. Br. 190).

We also note that while the Department lists findings of fact and conclusions of law as a basis for its contention as to this matter of impounding, finding 513 is the only one listed which in any way bears on the Ball situation and that finding does not support the Department or the statement above quoted from its brief or a similar statement contained on page 191 of that brief.

As to this matter of impounding, we urge and contend that the Trial Court exceeded its authority and in effect imposed a penalty on Ball Brothers. As to this, we urge that this Court again consider the subject matter set forth on pages 74-76 inclusive of our original brief and also the subject matter set forth on pages 163-168 inclusive of the joint brief.

We also contend that the order which resulted in the impounding of the $425,000 can not be considered as relief and we feel that our contention as to this is supported by the statement in the Department's brief (G. Br. 191) which is to the effect that the Department has no interest as to which defendant,—Hartford or Ball Brothers—gets the impounded money.

Conclusion.

In conclusion, we note that the Department's Brief on Reargument attempts to brush aside the defendants' criticism that the judgment is so indefinite that it is impossible to determine the meaning of many of its paragraphs and the scope of the injunction defined by it. This attempt is accompanied by the Department's interpretation of those portions of the judgment which are attacked as ambiguous. In this, the Department overlooks the fact that in the last analysis, a court will interpret the judgment and the portions thereof which bear on the future activities of the various defendants. It, therefore, seems apparent that the ambiguity of the judgment can not be cleared up by having the Department place its present interpretation on those portions of the judgment which are susceptible of at least more than one interpretation.

For the sake of brevity and also to avoid serious repetition in connection with this matter of ambiguity, we have only discussed a few paragraphs of the judgment. And, as noted, we have only referred to those paragraphs by way of example. We have also omitted any suggestions as to substitute paragraphs, since we

reaffirm the suggestions as to deletions and substitutions set forth in the joint brief.

Respectfully submitted,

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